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82-1284

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

A.T. KNIGHT,
G. GERALD KUNES
AND
KUNES & KUNES,

Petitioners,

VERSUS

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, Pa.
and
TONEY BROTHERS BANK,
Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

A.T. KNIGHT, G. GERALD KUNES, and KUNES & KUNES, Petitioners pray for a writ of certiorari to review the granting of Summary Judgment by the United States District Court for the Northern District of Georgia, Atlanta Division, granted on October 9, 1981, and to review the Judgment of the United States Court of Appeals for the Eleventh Circuit in this case, entered on the 20th day of August, 1982 and the denial of the Motion for Rehearing by the United States Court of Appeals for the Eleventh Circuit in this case entered on October 18, 1982.

QUESTIONS PRESENTED FOR REVIEW

This court should issue its Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit because that court

has so far sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings in granting a summary judgment against plaintiffs and in favor of defendant National Union Fire Insurance Company of Pittsburg, Pennsyvlania, as to call for an exercise of this court's power of supervision.

The District Court:

1. Disregarded the acts of the insurer which waived the insurer's right either under contract or statute to rescind its policy for fraud.

2. Placed burdens of proof, imputed knowledge of facts, failed to accept non-movant's version of the facts, or resolve all disputed matters, or draw inferences from the underlying facts in a light most favorable to the non-movant.

3. In granting its summary judgment the District Court resolved each and

every genuine factual issue and all inferences in favor of the moving party, even when there were undisputed facts from which different inferences could be drawn and as to which reasonable minds might differ.

4. Granted the summary judgment on opinion evidence.

5. Found the issue on summary judgment was the issuing of the renewal policy, and allowed the insurer to claim rescission of the renewal policy based on an alleged material misrepresentation made for a previous policy, which the materiality was waived because the insurer accepted the renewal application with the paragraph blank which would have maintained in the renewal policy representations and warranties of the old policy.

6. Did the summary judgment inaccurately hold that under McGhee v. Independent Life and Accident Ins. Co., 146 Ga.

App. 310, 246 S E 2d 349 (1978), plaintiffs could not use estoppel to create coverage where none ever existed, because on August 17, 1978 National Union rejected the May 8, 1978 claim on the exclusion of one insured against another, [App 19-20] and by this action National Union admitted Knight was an insured under the renewal policy. Should not this act bar the rescission under the doctrine of estoppel? (R-615) [App 13]

7. Did the court err in not compelling defendants to complete discovery pursuant to plaintiff's motions prior to granting summary judgment for the defendant?

8. Whether the court, under all the facts and circumstances, erred in refusing to grant plaintiff's motion for partial summary judgment on the issue of liability.

LIST OF THE PARTIES

(1) A. T. Knight, Plaintiff

(2) G. Gerald Kunes, Plaintiff

(3) Kunes & Kunes, Plaintiff

(4) G. Gerald Kunes, Attorney for Plaintiffs, having a contingent fee contract

(5) G. G. Joseph Kunes, Jr., Attorney for the Plaintiffs, having a contingent fee contract

(6) National Union Fire Insurance Company of Pittsburg, Pa., Defendant

(7) Toney Brother's Bank, Defendant.

Attorney of Record for Plaintiffs

G. Gerald Kunes

G. GERALD KUNES

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OPINIONS BELOW

The Summary Judgment of the District Court below is attached [appendix, Exhibit "A", infra, pages 1-16] is unreported. The opinion of the Court of Appeals below affirmed the grant of the summary judgment without opinion and is reported in 685 F.2d 1387, [appendix Exhibit "B" infra, page 17] The motion for rehearing was denied without opinion on October 18, 1982, by the Court of Appeals below and was not reported. [App 18]

JURISDICTION

The summary judgment of the district court [app 1-16] was filed October 6, 1981. The summary judgment was affirmed by U.S. Court of Appeals for the Eleventh Circuit on August 20, 1982. A motion for rehearing was filed and was denied on October 18, 1982. Notice of appeal to this court was filed on November 11, 1982. Jurisdiction is invoked under 28 USC §1245 [1].

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Enabling Act of June 19, 1934 authorized the Supreme Court of the United States to prescribe rules of civil procedure. These rules became effective September 16, 1938 by authority of U.S.C.A. Title 28, U.S. C.A. §2072.

1. Rule 56 in its pertinent part relating to Summary Judgments is as follows:

> 56[c]..."the Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no geniune issue as to any material fact and that the moving party is entitled to a judgment as a matter of law..."

2. The statute authorizing said rule is procedural and not

substantive, and provides as follows:

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the District Courts of the United States in civil actions. Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as it come in law and as declared by the 7th amendment of the Constitution."

STATEMENT OF THE CASE

A.T. Knight, hereinafter referred to as "Knight", sued National Union Fire Insurance Company of Pittsburgh, Pa. (hereinafter referred to as "National Union"), Toney Brother's Bank, (hereinafter referred to as the "bank") and the Federal Deposit Insurance Corporation, (hereinafter referred to as FDIC) both individually and as the receiver of Toney Brother's Bank. The action was for indemnity and damages arising out of National Union's refusal to pay under it's insurance policy "costs, charges and expenses" for defending Knight in certain actions brought against him in his capacity as an officer and director of the bank. Knight claimed coverage under a National Union Directors and Officers Liability and Corporate Reimbursement policy #651 71 27, (hereinafter

referred to as the "renewal policy") with a policy period from December 1, 1977 to December 1, 1978. This policy was a renewal of National Union's policy number 304 21 61 (hereinafter referred to as the original policy) which was effective from December 1, 1976 to December 1, 1977. Both policies were "claims made" policies. The original policy expired without a claim being made. Two claims were made under the renewal policy.

The first was made by the bank to National Union on May 8, 1978 and was for alleged wrongful acts by Knight while he was president of the bank. This claim resulted in National Union's home office claims manager, Stanley Morris, hiring an attorney in Albany, Georgia, Thomas Chambless, (hereinafter referred to as Chambless) to investigate the claim. (Morris. P. 27-29) [App 23-45] On June

30, 1978 Chambless made a 24 page report to Morris. (Morris P. 59) [App 26] On July 24, 1978 Morris, as a result of the Chambless report, suspected that the original policy had been procured by fraud, but made no further investigation. (Morris P. 63-65) [App 28-30]

On August 17, 1978 Morris wrote the bank on behalf of National Union and reaffirmed the Directors and Officers Liability coverage under policy 651 71 27, but denied the claim for acts of Knight because the policy excluded claims by one insured against another. [App 19-20] Thereafter in October of 1978 two stockholders of the bank sued National Union, Knight and a former cashier in the bank, jointly in a stockholders derivative action. After being served Knight consulted G. Gerald Kunes, an attorney. On October 18, 1978 Kunes placed a long distance phone

call to National Union's Atlanta office, for the claim's manager, and was connected with Don Browne who was the Atlanta claims manager. Kunes, who made the call for Knight said Browne consented for to pay "costs, charges and expenses" for National Union under the policy for Knight's legal defense. Later, Browne and National Union would dispute such phone call or authorization as made. (R-612 [App 9] National Union's home office claim file documents that the call was made to Browne on the date claimed, and that Browne immediately notified Morris at the home office, who immediately notified local counsel Chambless that Kunes would be representing Knight in the stockholders suit. (Morris P. 98) [App 43] Thereafter, Kunes, pursuant to Browne's instructions in representing Knight, contacted attorney

Chambless. About this same time three other stockholders filed suit against Knight, Jerry Dean Dorminey and The National City Bank of Rome in the U.S. District Court in the Northern District of Georgia alleging a 10-b-5 security violation in connection with the sale of bank's stock. These three claimants along with four other claimants and Knight had purchased 84% of the bank's stock in January of 1978 from Dorminey and the Rome bank financed the sale.

On November 1, 1978 Kunes mailed a statement for legal services to Chambless. The statement was for services rendered to October 30, 1978 in the stockholders derivative action plus a retainer for the stockholders derivative action and the securities claim. This statement was never paid because on November 2, 1978 National Union, through

its New York attorney, Gilroy, rescinded the original policy and the renewal policy as void ab initio for material misrepresentions in the applications for the original policy dated January 7, 1977 and for the renewal policy application dated September 26, 1977 both of which were signed by Knight.

The stockholders derivative action is still pending on a motion to dismiss for failure to state a claim. The 10-b-5 action was tried before a jury in Rome and resulted in a verdict to rescind the sale of the bank's stock. The court has granted a motion for new trial, which is still pending in Rome, Georgia.

After the verdict in the trial, Knight filed suit to recover "costs, charges and expenses" under the insurance policy in Count I of the complaint. Count II sought a judgment against

FDIC for damages, if National Union successfully had rescinded the policy. Count III sought damages against National Union for statutory bad faith. Count IV sought bad faith damages against FDIC, and Court V sought damages against National Union and FDIC for conspiracy. FDIC made a motion to be dismissed as a party which the court granted on August 18, 1980. National Union answered but denied liability by virtue of rescission. On May 8, 1980 National Union moved to disqualify Kunes as plaintiff's counsel. On December 23, 1980 the court granted this motion. Thereafter, Kunes and his firm made a motion to be made parties which the court granted on May 1, 1981. National Union gained considerable discovery while plaintiff was unrepresented by the court's order of December 23, 1980. Five days after the

Kunes were made parties, National Union, on May 5, 1981, moved for summary judgment. On June 1, 1981 Knight moved for a partial summary judgment on the issue of liability after depositions in New York of National Union's representives. On June 8, 29, and July 2, 1981 plaintiffs moved to compel National Union to make discovery. The court took no action on these motions until it dismissed them as moot on October 6, 1981 the date of summary judgment. On September 4, 1981 FDIC moved for the protective order. The court granted FDIC the protective order on September 21, 1981.

Both the National Union motion for summary judgment and plaintiffs motion to compel discovery were submitted to the court on June 18, 1981. The second motion to compel discovery was

submitted to the court on July 13, 1981. Neither submission was ever acted on by the court to compel National Union to make this discovery prior to granting National Union's summary judgment. The depositions taken of National Union's employees in the last week of May, 1981, in New York could not be filed in District Court prior to the grant of National Union's summary judgment because National Union employees did not, could not or would not sign them.

The court relied on unfiled testimony of Morris and Browne in granting defendants summary judgment on October 6, 1981. The court in it's letter of transmittal of the summary judgment reminded defendants to be sure to file these depositions.

The basis of National Union's

motion for summary judgment was that Knight in executing the January 7, 1977 application for the original policy answered question 14 on the application fraudulently by representing to National Union that there had never been a cease and desist order received from a regulatory authority. This was untrue because on February 27, 1976 the Georgia Department of Banking and Finance had issued a cease and desist order to Toney Brothers Bank prohibiting them from making any further loans in excess of their legal lending limit to stockholders or directors who owned more than 10% of the bank's stock. At that time Jerry D. Dorminey owned 84% of the bank's stock. At the time of the cease and desist order Knight was not a stockholder of the bank, and did not become one until January of 1978 when he and seven other individuals

purchased 84% of the bank stock from Dorminey. National Union, in its letter of rescission of November 2, 1978, did not assign as the ground of rescission, Knight's untruthful answer to question 14 of the original application, instead assigned as grounds answers to questions 18, 19 and 20 on the January 7, 1977 application. These answers to questions 18, 19 and 20 were not the ground upon which the District Court granted the summary judgment unholding the rescission of the policies by National Union.

The summary judgment was based on expert opinion testimony of National Union's Vice-president of underwriting, Cavallero, and underwriter Ratner, to the affect that the answer to cease and desist question on the original application was material to acceptance of the risk. The court also found the cease

and desist order was material on the evidence of Driscoll, an employee of Hartford Life and Accident Insurance Company, who had been the issuer of the bank's Blanket Bond until Knight notified Driscoll of the bank's receipt of the cease and desist order. The other expert opinion testimony relied upon the court in granting summary judgment was testimony of Kline who was an officer of the Georgia Department of Banking and Finance.

In opposition to National Union's motion for summary judgment plaintiffs contended that National Union had waived the materiality of the cease and desist order by not seeking up to date information of any other cease and desist orders on the renewal application of September 26, 1977, and that if failure to advise National Union of the

cease desist order was a ground of forfeiture, the forfeiture had been waived by National Union prior to the November 2, 1978 consenting to pay Knight's "costs, charges and expenses" in defending the law suits. Plaintiffs also contended that National Union accepted the September 26, 1977 renewal application with paragraph 9 unanswered by Knight. Plaintiffs further contended that National Union altered the renewal application without notice to the bank or Knight by inserting the date of 1/7/77 in the blank space in paragraph 9. Plaintiffs contended that the acceptance of the incomplete application or the alteration thereof on renewal, was a failure of the renewal application to maintain the warranties made in the original application on the renewal policy. And even if said warranties were

maintained on renewal, the materiality of the cease and desist information was waived by National Union's failure to ask any cease and desist questions on it's renewal application. Plaintiffs further contended that any forfeiture was waived by the insurer by consenting for Knight to incur "costs, charges and expenses" in defending the two actions against him, after they acquired notice on July 7, 1978 of the existence of the cease and desist order as a result of attorney Chambless' investigation of the Toney Brothers Bank claim against National Union for Knight's acts. A further waiver of the forfeiture was claimed by the plaintiffs by virtue of National Union's reaffirmance of coverage to Toney Brothers Bank when they denied the bank's claim against Knight as being excluded under the policy as being a claim of one

insured against another because the bank and Knight who were both insured's under the policy.

The District Court on October 6, 1981 granted defendant's motion for summary judgment, finding that the cease and desist order was material to acceptance of the risk on the basis of the expert opinion testimony of Cavallaro, Ratner, Driscoll and Kline and that National Union's policy number 651 71 27 was void ab initio under Georgia Code §56-2409 because of the material misrepresentations made by Knight on behalf of Toney Brothers Bank in the applications of August 3, 1976 and January 7, 1977. The court further held that the even if National Union authorized Knight to employ Kunes to represent him October 18, 1978, before declaring the policies void on November

2, 1978, National Union is not estopped from denying coverage because estoppel could not "create coverage where none ever existed." Defendant National Union Fire Insurance Company's motion for summary judgment was granted. Plaintiffs motion for partial summary judgment was denied. Plaintiffs two motions to compel discovery were dismissed as moot.

On October 26, 1981 plaintiffs appealed to U.S. Court of Appeals for the Eleventh Circuit. On November 2, 1981 the depositions of National Union's Morris and Browne were filed. The U.S. Court of Appeals for the Eleventh Circuit affirmed the grant of summary judgment without opinion on August 20, 1982. A motion for rehearing was timely made which the U.S. Court of Appeals for the Eleventh Circuit and denied on October 18, 1982. Notice of appeal to this court

was filed November 11, 1982 with the U.S. Court of Appeals for the Eleventh Circuit.

LAW AND ARGUMENT

The parties disputed and it was a question of fact whether Knight did submit the renewal application with the date blank, in answer to paragraph 9, or whether an employee of National Union added the date "January 7, 1977" in this blank. The summary Court unjustly decided this issue of fact by finding Knight agreed [sic] some application completed some time would constitute part of the renewal policy and the two previous original applications were identical in respect to the fraud, and further Knight knew [sic] that National Union was relying on one or both of the previous applications, and the court further found the plaintiffs cannot benefit from Knight's refusal or failure to fill in the date requested, and finally, even in

absence of the date, paragraph 9 binds Knight and the bank. (R-610) [App 7]

This Court's Writ of Certiorari is required now because these issues of fact denied the Court the right to grant a motion for summary judgment. The company, by accepting an incomplete or imperfect renewal application without further inquiry waived it's right to rely on the original applications and the alleged fraudulent misstatements in the inception. Aetna Life Ins. Co. v. France, 94 US 561, 24 L ed 287, and also defendant had the burden to prove an issue of fact did not exist on motion for summary judgment. Federal Rule Civil Procedure 56 (c); Arnett v. Kennedy, 416 US 134, 139-140, 40 L ed 2d 15, 94 S Ct 1633.

The true facts of which insurer's employees had notice was was in its officers and directors underwriting manual which warned that if a renewal application was accepted without a date inserted in paragraph 9, the "warranties and

statement contained within the application attached to the insured's original policy" would not be maintained on the renewal policy. (R-363) [App 63-64] Therefore the acceptance of the renewal application was not only a waiver of the right to demand a fully executed application, Phoenix Mut. Life Ins. Co. v. Raddin, 120 US 183, 7 S Ct 500, 30 L ed 644, it also barred the defendant's reliance on the original warranties and statements on the renewal policy which was the only policy in issue according to the undisputed finding of fact by the court in the summary judgment. [R-616] [App 14]

A contract may be rescinded at the instance of the parties defrauded but in order to rescind he must promptly, upon discovery of the fraud, restore or offer to restore to the other whatever he has received, by virture of the contract, if it be of any value. Georgia Code Annotated §20-906.

It would be well at this point to bring

to the court's attention, the summary court's refusal to recognize the case of Robb v. Vos, 115 US 13, 15 S Ct 4, 39 L ed 52, which holds:

> "Any decisive act by a party with knowledge or his rights and of the facts, determines his election in a case of inconsistent remedies."

It has also been held this amounts to waiver in Kennedy v. Manry, 6 Ga. App. 816 (1909), the leading case in the country on the difference between waiver and estoppel. The case before the court involves the doctrine of waiver and estoppel. In estoppel the actors conduct may be unintentional, in waiver it must be intentional. For estoppel to result the other party must be injured or prejudiced, waiver on the other hand, may benefit the other party. Kennedy v. Manry, 6 Ga. App. 816 (1909). The insurer is bound by the acts of it's agent in changing an application after it is signed. Couch On Insurance, 2d §35; p. 261.

The summary judgment, unless reversed, is clearly contrary to the Georgia Doctrine of Waiver announced in the 1982 cases of Penn. Life Insurance Co. v. Tanner, 163 Ga. App.330, cert. denied, Georgia International Life Insurance Co. v. Bear's Den, Inc., 162 Ga. App. 833, Redmond v. Merrill Lynch Relocation Management, Inc., 163 Ga. App. 346, Rosenburg v. Liberty Mutual Insurance Co., 162 Ga. App. 561, and this court's holding of Northern Assurance Co. v. Grand View Building Association, 183, US 308, 225 S Ct 133, 46 L ed 213 (1901). A party may waive any provision either or contractual or statutory intended for it's benefit. Shutte v. Thompson, 15 Wall 151 21 L ed 123.

National Union made the following waivers of provisions intended for its benefit:

(a) In accepting the September 26, 1977 renewal application with paragraph 9 blank without objecting or requiring a completed application;

(b) By filling in the blank space in

paragraph 9 with the date 1/7/77 on the September 26 renewal application without notice to Toney Brothers Bank;

(c) By failing to promptly rescind the policy after it acquired notice of a ground of rescission on July 7, 1978; [App 30-31]

(d) By reaffirming coverage to Toney Brothers Bank on August 17, 1978 after National Union had notice of a ground upon which to rescind; [App 19-20]

(e) In consenting on October 18, 1978 for Knight to incur "costs, charges and expenses" in connection with his defense of claims brought against him as an officer and director of Toney Brothers Bank. [App 42]

National Union waived the contractual and statutory benefits intended for it and this precluded the grant of summary judgment for Nat-

ional Union on the basis of such acts amounting to acquiescence, and though the contract was originally impeachable, the contract becomes unimpeachable. Phoenix Mutual Life Insurance Co. v. Doster, 106 US 30, 1 S Ct 18, 27 L ed 65.

This court has ruled that certain acts of an insurer can amount to a "waiver by election", Hartford Life and Accident Insurance Co. v. Unsell, 144 US 439, 12 S Ct 671, 36 L ed 496.

National Union after it had notice on July 7, 1978 of a ground to rescind for fraud in the inception, waived it's right of rescission by electing instead on August 17, 1978 to reaffirm to Toney Brothers Bank the coverage under the insurance policy. [app 19-20]

On October 17, 1978 Mr. Morris, National Union's home office claims manager wrote the bank in response to a claim filed by the bank under policy for wrongful acts of Knight:

> "The National Union...provides Directors and Officer Liability

> and Corporation Reimbursement to Toney Brothers Bank...during the policy period December 1, 1977 to December 1, 1978. We received... a possible claim. We retained Waston, Spence, Lowe and Chambless...to investigate further into the matter....
>
> It would appear that the claim you have advanced in your letter clearly...falls within the exclusionary language of the endorsement above. The policy afforded by National Union Fire Insurance Company of Pittsburgh, Pa would not by its terms apply and we accordingly...must reject the claim." [App 19-20]

The insurer elected to affirm the policy after it had notice of the ground of forfeiture. The company had the same information on July 7, 1978 that it used to later rescind on. [App 38] The failure to rescind instead, of affirm on August 17, 1978 amounted to a "waiver by election." Hartford Life Insurance Co. v. Unsell, 144 US 439 12 S Ct 671, 36 L ed 496. This was a decisive act by a party with knowledge of his rights and the facts, and this determines the legal rights of the parties once and for all. Kennedy v. Manry, 6 Ga. App. 816 (1909),

Robb v. Vos, 115 US 13 15 S Ct 4, 39 L ed 52, Rowe v. Weichselbaum Co., 6 Ga. App. 504

A second waiver occurred on October 19, 1978 when Morris elected to consent to Knight hiring a lawyer. This second waiver again amounted to affirmance of the policy rather than a recision based on a knowledge of forfeiture.

> "An election once made with knowledge of the facts between coexistent remedial rights which are inconsistent is irrevokable and conclusive, irrespective of intent, and constitutes an absolute bar to a defense founded on such inconsistent rights." [emphasis ours] Rowe v. Weichselbaum Co., 3 Ga. App. 504.

This makes the granting of the summary judgment error because the court ignored the undisputed evidence in the case that the insurer consented on October 18, 1978 for the plaintiff to incur "costs, charges and expenses" pursuant to paragraph 6 of the policy. The consent was given after the insurer had notice of the ground of forfeiture on July 7 and 14 of 1978. The con-

sent was given after the insurer reaffirmed coverage and that Knight was insured under the policy in the letter of August 17, 1978 to the bank.

It is a well settled rule that a party who is entitled to rescind a contract on account of false or fraudulent representation, when he has full knowledge of all the material circumstances of the case, if he freely and advisedly does anything which amounts to a recognition of the transaction or action of a manner inconsistent with his repudiation, it amounts to acquiescence and though originally impeachable, the contract becomes unimpeachable even in equity. New York Life Insurance Co. v. Eggleston, 96 US 572, 24 L ed 841; Phoenix Mutual Life Insurance Co. v. Doster, 106 US 30, 1 S Ct 18, 27 L ed 65; Hartford Life and Accident Ins. Co. v. Unsell, 144 US 439, 12 S Ct 671, 36 L ed 496.

2. The court erred in granting a summary judgmemt because there was a genuine dispute of fact on material issues. Associated

Press v. United States, 326 US 1, 65 S Ct 1416 89 L ed 2103 (1945). The materials before the District Court having raised a genuine issue as to ultimate facts material to the issues presented, the grant of summary judgment was improper under Fed Rules Civ Proc, 56 (c). United States v. Diebold, 369 US 654, 8 L ed 2d 176, 82 S Ct 993. The District Court in granting summary judgment cast burdens of proof, as well as imputed knowledge to the plaintiff, required him to object to the alteration of the application, and presumed Knight agreed to the alteration of the renewal application by the insurer. The court obviously erred in failing to resolve all genuine disputes as to material facts in favor of the appellants in granting summary judgment for the insurer. If the court is to grant summary judgment it must resolve all genuine disputes as to material facts in favor of the appellant. Arnett v. Kennedy, 416 US 134, 139-140, 40 L ed 2d 15, 94 S Ct 1633, (1974).

The court in order to grant summary judgment against the appellant must accept his version of the facts and every other inference which could be drawn from this evidence. Bishop v. Wood, 426 US 341, 48 L ed 2d 684, 96 S Ct 2074 (1976).

The specific instances where the court erred in construing the evidence unfavorable to the appellant occurred when the court did not require evidence of the specific underwriting standards used to issue a directors and officers liability policy, nor was there evidence that cancellation of the bank's blanket bond would in any way affect the risk of an officers and directors liability policy, nor did the evidence of John B. Kline, of the Georgia Department of Banking and Finance, in any way show the issue of materiality in assuming the risk of a directors and officers liability policy.

The court found likewise found "plaintiffs have presented no evidence to controvert

these statements and on the basis on the evidence of Ratner, Cavallero, Driscoll and Kline and the undisputed fact that Hartford cancelled the bank's blanket bond," (R-609) [app 6] the court held as a matter of law that the negative response to question 14 was a material misrepresentation within the meaning of Georgia Code §56-2409. (R-610) [app 7] The court further misconstrued the evidence by finding as a fact Knight agreed [sic] on behalf of the bank that some application completed at some time would constitute part of the renewal application and would form a part of the renewal policy, While giving lip service to construing the evidence in a light most favorable to the plaintiffs, the court nevertheless construed it most favorably to the defendants by finding that therefore, Knight knew [sic] "when he filed the renewal application that National Union was relying or one or both of these previous applications, complete with material misrepresentations in issuing the renewal policy." There was no evidence that Knight was

an expert on what was or was not a material misrepresentation to acceptance of the risk of a officers and directors liability policy. The court further found that plaintiff could not benefit from plaintiff Knight's purported failure or refusal to fill in the date requested in paragraph 9 of the renewal application. There was no evidence that Knight refused to fill in the date nor was there any evidence that Knight knew which date National Union wished to rely upon in issuing the renewal policy. The proper course for the insurer to have taken would have been to have returned the renewal application to Knight after it had inserted the date and ask him to either initial the date or send him a new renewal application to sign with the information inserted the company wanted on renewal. However, the court totally ignored these options and the failure of the insurer to protect itself, but held that the negligence of the insurer was irrevelant, that it had not waived it's ground of rescission, nor did it waive the ground of

rescission for material misrepresentations in the inception by not requiring Knight to fully execute the renewal application contrary to this court's holding in Aetna Life Insurance Co. v. France, 94 US 561, 24 L ed 287. On the other hand, the trial court in granting summary judgment held that "paragraph 9 binds Knight and the bank even in the absence of this date." (R-610) [app 8]

The court further erred in holding that since the altered renewal application was attached to the renewal policy, the insured had a duty "to examine the insurance contact and to renegotiate any unacceptable terms," This is absolutely contrary to the holding of Aetna Life Insurance Co. v. France, 94 US 561, 24 L ed 287. The court further held that the failure to object to the addition of the date of January 7, 1977 to paragraph 9 provided a second independent ground to find that the misrepresentation was incorporated into the September 26, 1977 renewal application and the renewal policy itself.

This finding is also contrary to this court's finding in Aetna Life v. France, supra, and ignores the doctrine of waiver therein announced.

> "If the company was not satisfied with the qualified answer of the applicant, they should have rejected his application, having accepted it, they were bound by it." Aetna Life Insurance Co. v. France, 94 US 561, 567, 24 L ed 287, 290.

The court further erred in refusing to recognize plaintiffs argument that the failure to attach the January 7, 1977 application prevented it from being incorporated into that policy. As pointed out previously the company's act of accepting the application with paragragh 9 blank waived any information that it might have acquired, but the court refused to recognize this principle, but held that since the September 26, 1977 renewal application was attached to the renewal policy, and it incorporated by reference one or both of the earlier applications each of which contain a material misrepresentation, that this would bind the plaintiffs without reference

to whether the application was attached to the policy or not and cited Georgia cases. It should be pointed out that the cases cited by the court and relied thereon are all distinquishable from the case at bar on their facts. In granting the summary judgment for this insurer the court accepted all of the movant's contentions and rejected all of the respondent's. The court overlooked the question of whether a consent to pay "costs, charges and expenses" would be a wavier of National Union's right to rescind, or the fact that Knight was an insured by National Union's admission. The court further burdened plaintiffs with the duty to prove that the authorization to pay and it's withdrawal two weeks later prejudiced Knight.

Therefore, the court's grant of summary judgment is contrary to Rule 56 of the Rules of Civil Procedure and the decisions of this court relative to the requirements upon which summary judgment can be granted.

3. The issues of fact which the court

decided in favor of the movant were "the cease and desist misrepresentation was material to the risk of a Directors and Officers Liability Corporate Reimbursement policy." Now there was evidence that the "risk or hazard is greater insuring financial institutions and the officers and directors of financial institutions who have a history of economic and regulatory problems", and the cease and desist order "highlights a bad situation in any bank", and a cease and desist order "is not a commonplace event and is a matter of great seriousness", and that a cease and desist order is "the strongest and ultimate device that a regulatory agency has in it's supervision of a bank." However none of these opinions or conclusions individually or collectively show in any way how a cease and desist order affects the risk of insurance undertaken in a directors and officers liability policy. Nor is cancellation of a bankers blanket bond shown to be relevant to the acceptance of the risk undertaken by National Union. However, notwithstanding this

lack of evidence, the court held as a matter of law that the negative response to question 14 in the application was a material misrepresentation within the meaning of Georgia Code §56-2409.

The court further construed the evidence most favorably toward the movant by finding that, even though the application for the renewal was sent in with a blank answer to paragraph 9, nevertheless the attachment of the altered application to the renewal policy bound the bank and the plaintiffs without reference to whether the material misrepresentation was waived by the insurer by accepting an incomplete application. The court also found that "the parties agree that any such 'authorization' was revoked by a letter from National Union's lawyer to Toney Brothers Bank dated November 2, 1978 declaring the policy void ab initio." No such evidence of any such agreement exists. This finding by the court is totally contrary to the evidence and represents an impermissable finding of fact which is not supported by any evidence. The court further found

favorably for the insurer that it was not estopped from denying coverage after reaffirming coverage to the bank and consenting for Knight to employ an attorney. National Union's act of denying the claim of May 8, 1978 on the ground Knight was an insured is the basis for an estoppel, however, the court found no estoppel. The court further construed testimony of Stanley Morris favorably toward the insurer in granting summary judgment, but ignored such evidence of Morris which corroborated the plaintiff's contention that authorization to defend Knight was given by National Union. (Morris Dep. 95-96, 97-99, 117) [app 40-45] The court also found Browne's authorization did not estop National Union from declaring the rescission. The court in making these findings overlooked National Union's reaffirmance of the policy of insurance on August 17, 1978 and it's consent to Knight on October 18, 1978. The court's various findings that no estoppel resulted is contrary to this court's holding in Union Mutual Insurance Co.

v. Mowry, 96 US 544, 547, 24 L ed 674, 676, where this court ruled:

> "An estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact, to a present or past state of things."

An estoppel operates where it relates to an existing right and is made to influence others and by which they have been induced to act, in this case the bank's acceptance of the claim denial.

> The doctrine of estoppel is applied with respect to the representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them."

The court in holding that there was no estoppel by National Union, overlooks the fact that even though no prejudice may have been shown to Knight, when the insurer had Kunes disqualified as counsel and the court allowed Kunes to enter as a party, this then brought Kunes into

the case as a party plaintiff and the insurer's conduct which led Kunes to rely on the representation that they would pay Knight's attorneys fees created an estoppel from which the insurer could not retreat and thereafter deny its obligation to pay for Knight's defense. These issues were overlooked by the court in granting summary judgment.

Likewise the court construed Georgia Code §56-2409 in favor of the insurer when it held that this code section automatically made the policy void, not voidable at the option of the insurer. The court overlooked in this regard the waiver by, or the estoppel of the insurer of its statutory right to declare the policy void. Shutte v. Thompson, 15 Wall 151, 21 L ed 123

4. The court clearly created error when it granted the summary judgment on opinion evidence. Sartor v. Arkansas Natural Gas Corporation, 321 US 620 88 L ed 967, 64 S Ct 724, (1944). The court further committed error in granting a summary judgment based on opinions of

experts who had relations with the defendant or other corporations engaged in similar business, because such testimony is open to suspicision of bias Santor, supra. The Santor court further held that summary judgment is not warranted where undisputed facts lead to the existence of a cause of action dependent on questions which are reserved from the summary judgment process by provisions of Rule 56 of the Federal Rules of Civil Procedure. The grant of summary judgment should be reversed.

5. The basic difference between estoppel and waiver is that in waiver the act is the intentional relinquishment of a known right whereas estoppel results from an unintentional act which prejudices or causes another to act in reliance upon such intentional act. In wavier there is no prejudice required, although it may exist. Wavier is a fact provable by parole evidence as well as by writing, for the obvious reason that it could be done without writing. Knickerbocker Life Insurance Co. v. Norton, 96

US 234, 24 L ed 689. In this case the insurer's waiver is by both means. On August 18, 1978 Morris waived the forfeiture for the policy for misrepresentation by writing the bank reaffirming coverage in denying the claim. If the policy was void ab initio movant knew it then. He acquired no more information. [App 38] On October 18, 1978 Browne and Morris waived the forfeiture by consenting for Knight to incur "costs, charges and expenses." The Court erred in not seizing on these waivers to avoid the forfeiture.

6. Forfeitures are not favored in the law. Knickerbocker Life Insurance v. Norton, 96 US 234, 24 L ed 689.

> "Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party as relied and acted. Any agreement, declaration or course of action, on the part of an insurance company, which leads a party insured honestly to believe that conforming thereto a forfeiture of his policy will not be incurred, followed by due conforming on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed

under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture. New York Life Insurance Co. v. Eggleston, 96 US 577 24 L ed 843.

The court further erred in not finding a waiver of the forfeiture because this court has held that forfeitures are not favored in the law; and that courts are always prompt to seize hold of any circumstances that indicate election to waive a forfeiture or an agreement to do so on which the party has relied or acted. Knickerbocker Insurance Co. v. Norton, 96 US 234, 24 L ed 689.

A further question of waiver or estoppel was raised by the acceptance of the application for the insurance with a question not answered or imperfectly answered, and the company issued the policy without further inquiry it was held to be a waiver of the warranty of the imperfection which act by the insurer renders immaterial the ommission to answer the question more fully. Phoenix Mutual Life Insurance Co. v. Raddin, 120 US 183, 7 S Ct 500, 30 L ed 644.

The court below also refused to follow

Robb v. Vos, 115 US 13, 15 S Ct 4, 39 L ed 52, when the insurance company had waived a remedy with knowledge of the facts and the court below later allowed the insurer to recall it's waiver. This is contrary to this court's previous ruling in the Vos case above.

Likewise, the court below refused to treat the insurers reaffirmation of coverage to the bank on August 17, 1978 after the company had notice of the ground to rescind, as a "waiver by election" and this was contrary to this court's holding in Hartford Life & Accident Insurance Co. v. Unsell, 144 US 439, 12 S Ct 671, 36 L ed 496, as well as this court's doctrine of waiver announced in Northern Assurance Co. v. Grand View Building Association, 183 US 308, 225 S Ct 133, 46 L ed 213 (1901). Nor did the court below follow this court's decision in Barker v. Wingo, 407 US 514, 92 S Ct 2128, 33 L ed 101, which announced the doctrine of waiver as an intentional relinquishment or abandonment of a known right or privilege. Nor did the court

below find that the insurer's waiver was a bar to a defense which the insurer had waived, under the doctrine of Reynolds v. Bruce, 12 Pet 497, 9 L ed 1171 and Lucas v. Brooks, 18 Wall 436, 21 L ed 779. Nor did the court follow Shutte v. Thompson, 151, 121 L ed 123, which holds a party may waive any provison, either contractual or statutory intended for his benefit. Nor did the court follow the rule of Phoenix Life Insurance Co. v. Raddin, 120 US 183, 7 S Ct 500, 30 L ed 644, or Aetna Life Insurance Co. v. France, 94 US, 561 24 L ed 287, which held that acceptance by the insurer of the incomplete or imperfect application waives the insurers right to further rely on any information which would have been forthcoming had the insurer insisted upon a completed application.

It is respectfully submitted that the District Court totally confused the law of waiver and misapplied the doctrine of estoppel.

7. The court was obligated to assist plaintiff in compelling discovery Rule 37 Federal

Rules Civ Proc. Failure to compel discovery prior to grant of summary judgment was prejudical.

8. In view of what has been said above the trial court erred in failing to grant the plaintiff's motion for partial summary judgment on the issue of liability. There was no dispute that at all times relevant Knight was a director and officer of the insured bank, and that the insurance company waived the materiality of the cease and desist order by accepting the incomplete renewal application with paragraph 9 blank There was no dispute that the insurer learned on July 7, 1978 that a cease and desist order had been issued to the bank, or that on July 14, 1978 the insurer was concerned about the procurement of the policy. [App 28] Nor was there a dispute that on August 17, 1978 the insurer claimed Knight as its insured in denying the claim and reaffirming the insurance coverage to the Toney Brothers Bank. Nor was there any dispute that on October 18, 1978 the insurer was contacted by Knight's attorney con-

cerning the stockholders derivative action, or that the insurer authorized Knight to incur "costs, charges and expenses." Nor was there any dispute that pursuant to such consent Kunes proceeded to represent Knight and that the "costs, charges and expenses" were incurred. Nor was there any dispute that the insurer did not seize upon the forfeiture until four months after it had notice of it's right to rescind, and that such rescission was after it had reaffirmed policy coverage to Knight to incur "costs, charges and expenses." Under these facts and circumstances the plaintiffs motion for partial summary judgment should have been granted.

For these reasons this court should order the grant of summary judgment to the plaintiff as a necessary preliminary adjudication whose purpose would be to speed up the litigation by eliminating before trial matters wherein there is no genuine issue of fact. The rule provides that a "summary judgment, interlocutory in character, may be rendered on the issue of liability

alone or although there is a genuine issue as to the amount of damages." Federal Rules Civil Procedure Rule 56(c).

The insureds acts waived contractual and statutory rights, this makes the trial court's judgment denying plaintiffs motion for partial summary judgment error. It should be reversed on remand.

CONCLUSION

Certiorari should be granted in this case because the district court has unaccountably and peculiarly departed from law and custom by failing to resolve disputes of fact on material issues on defendant's motion for summary judgment. Under 56 of the Federal Rules of Civil Procedure a summary judgment cannont be granted where genuine issued of fact remain. Specific acts of the insurer resulted in a waiver of the company's right to rescind it's renewal policy, and resulted the disputed material issues of facts.

The question of waiver by the insurer

of it's right to rescind is a question of fact which the court did not decide on summary judgment. This application for certiorari is required by the court's failure to dispose of this and other factual issues before granting summary judgment for the defendant. The decision deals with a great many facts but unfortunately ignores all the principles of law, and this court should exercise it's power of supervision to correct this error.

No matter how many facts may point to a conclusion as a matter of law, a party need only raise one issue of fact to survive summary judgment, Pantor v. Marshall Field & Co., 646 F 2d 271, cert denied.

Another compelling reason for the certiorari is the Eleventh Circuit panel summarily denied the appellate hearing to correct the trial court's errors. This appears to be a severe dereliction of it's duty and puts the burden on this court to correct not only error by the trial court, but also the apparent error of the Appellate Court.

It is respectfully submitted that issues of fact remain in this case, and therefore each and every judgment of the court below should be reversed and on remand it should be ordered that the District Court's grant of summary judgment for the insurer be reversed and denied, and that the plaintiff's motion for partial summary judgment as to liability be reversed and granted, and that the plaintiff's motions to compel discovery be granted.

Respectfully Submitted

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